LIBRARY
SUPREME COURT, U. S.

No. 305

Office-Supreme Court, U.S.
FILED
JUN 6 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

A. J. WHIPPLE and MILDRED WHIPPLE,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING

A. C. LESHER, JR.,
Counsel for Petitioners;
628 Texas National Bank Building,
Houston 2, Texas.

CHARLES DILLINGHAM,
BEN H. SCHLEIDER, JR.,
JOHN S. BRUNSON,
802 Texas National Bank Building,
Houston 2, Texas.

EARL C. KULLMAN,
120 Broadway,
New York 5, New York.
Of Counsel for Petitioners.

SUBJECT INDEX

	PAGE
INTRODUCTION	1
GROUNDS FOR REHEARING	2
CRUX OF THE DECISION	2
POINTS:	
I. Union dues have uniformly been held by the Internal Revenue Service to be deductible	3
II. It was nowhere intimated in the Government's Briefs and hence Petitioners' counsel was not alerted to the fact that this Court would be asked to rule in a manner directly contrary to specific statutory provisions	3
III. Applicable material on legislative history is not available in Texas	8
IV. Government's failure to cite applicable statutory provisions	9
V. Present decision is contrary to statute	10
VI. Problems on remand not considered	11
VII. Conclusion	12

AUTHORITIES CITED

Cases

	PAGE
Campbell, Vincent C., 11 TC 510, *Acquiescence*, 1949-1 CB 1	12
DuPont v. Deputy, 289 U. S. 685	4
Higgins v. Commissioner, 312 U. S. 212	4
Kales v. Commissioner, 101 F2d 35	8
Motch, Edwin R., Jr., 11 TC 777, rev'd. 180 F2d 859	9, 10
Sperry v. The Florida Bar, U. S. , 5/27/63	4, 8
United States v. Gilmore, 372 U. S. 39	4, 8, 12
von Echt, Alice P. Bachofen, 21 BTA 702 rev'd. 11/9/32, 1 P-H BTA Memo Dec. ¶ 32,254	7, 8

Statutes

1954 Internal Revenue Code, § 7701(a)(26)	2, 4, 10
1939 Internal Revenue Code, § 23(a)	8
§ 48(d)	2, 4
1942 Revenue Act, § 121(e)	4, 5

Other Authorities

TREATIES	
United Kingdom-United States Income Tax Treaty (60 Stat. 1377)	11, 12
INTERNAL REVENUE RULINGS	
I.T. 4012, 1950-1 CB 33	10
"*Your Income Tax*" 1961 Edition p. 45	3
COMMITTEE REPORTS	
Senate Report No. 558, 73rd Cong., 2d Sess. (Finance)	11

PAGE

CONGRESSIONAL HEARINGS

Finance Committee, 1934 Rev. Act, H.R. 7835, 73rd Cong., 2d Sess., March 6, 1934 3, 5, 7

TEXTS AND LAW REVIEWS

Seidman's Legislative History of Federal Income Tax Law, 1861-1938 5

Seidman's Legislative History of Federal Income and Excess Profits Tax Laws, 1953-1939 6

Dean Erwin N. Griswold, 52 Harv. L. R. 718 6

No. 305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

A. J. WHIPPLE and MILDRED WHIPPLE, *Petitioners,*

against

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR REHEARING

Introduction

The above-captioned case was argued March 26 and March 27, 1963, by Mr. Charles Dillingham of Houston, Texas, for the Petitioners, and The Solicitor General for the Respondent.[1]

The case was decided by an opinion handed down on May 13, 1963, written by Mr. Justice WHITE; Mr. Justice DOUGLAS dissented without opinion; there were no other expressions of views of other members of this Court.[2]

The basic issue is whether a bad debt was properly deducted as a business bad debt as Petitioners argued; or whether it was deductible only as a non-business bad debt as Respondent argued successfully. If the Petitioners had prevailed, the bad debt would have been fully deductible from ordinary income; since the Respondent prevailed, the bad debt has been held to be deductible as a short-term capital loss (deductible only against capital gains).

[1] The *dramatis personae* are mentioned since, as it will be shown, there is some relevancy.

[2] Again, this fact is mentioned as relevant. Specific comments from Associate Justices Black, Goldberg and Stewart could have been reasonably expected in the light of the matters hereinafter set forth.

The importance of the issue to the Government can be assumed from the fact that The Solicitor General personally argued the Government's case.

Grounds for Rehearing

(1) The Respondent failed to cite a statutory provision (1954 Internal Revenue Code Section 7701(a) (26)) which makes the Court's opinion untenable and at variance with statutory law.

(2) The Respondent induced the Court to assume, contrary to the fact that the 1942 amendments approved this Court's prior holdings; the historical fact is the reverse, the amendment was retroactive back to March 1, 1913.

(3) Important historical material on Legislative History has only recently been discovered and should be considered.

(4) Important legislative material is available to Respondent but not to Petitioners and warrants this Court's consideration of methods to equalize this disparity in litigating capabilities.

(5) The Court's opinion may lead to the disallowance of Union Dues which have been allowed as deductions for 50 years.

Crux of the Decision

Perhaps the very heart of Mr. Justice WHITE's opinion is summarized in the following sentence:

> "If full-time service to one corporation does not alone amount to a trade or business, which it does not, it is difficult to understand how the same service to many corporations would suffice."

We think that we will present a case where this Court has not had its attention properly called to the applicable

statutory provisions and the legislative history which *induced* Congress[3] to enact the provisions which it did and that this Court will come to a very different conclusion after the matters hereinafter set forth are reviewed.

I.

Union dues have uniformly been held by the Internal Revenue Service to be deductible.[4]

There is no statutory authority. The administrative practice for 50 years has been based upon the fact that an employee is *ipso facto* engaged in *his own* trade or business whether or not it can be said that he is, by the same token, engaged in his employer's trade or business. Certainly at least one member of the present Court will concede that there are employers who, rightly or wrongly, would say that the payment of Union Dues by their employees advances the employer's trade or business not at all, in fact the very reverse.

Hence we think it is fair to assume that had Mr. Justice GOLDBERG been advised by The Solicitor General that painting, with the broad brush which he offered to the Court, would result in at least jeopardizing, if not furnishing direct support for reversing, the long established administrative practice of allowing deductions for Union Dues, he would have specifically concurred. More likely, violently dissented.

II.

It was nowhere intimated in the Government's Briefs and hence Petitioners' counsel was not alerted to the fact that this Court would be asked to rule in a manner directly contrary to specific statutory provisions.

---

[3] Finance Committee Hearings, 1934 Revenue Act, quoted *infra*.

[4] "Your Income Tax," 1961 Edition page 45. An annual official publication of the Internal Revenue Service.

Section 7701 (a)(26) of the 1954 Internal Revenue Code is a re-enactment of Section 48(d) of the 1939 Code, *both of which*, read as follows:

> "TRADE OR BUSINESS.—The term 'trade or business': includes the performance of the functions of a public office."

This provision was written into the Revenue Act of 1934 as a result of the Internal Revenue Bureau's campaign to disallow the hire of clerks and telephone calls made by United States Senators. The Court's action not only in its May 13th decision in the instant case but also in the decision upon which that opinion was based, the February 18, 1963, opinion in *United States v. Gilmore*, 372 U. S. 39, could very well cause a resurgence of the pre-1934 campaign

The importance of legislative history has only recently been emphasized by this Court's decision of May 27, 1963, in *Sperry v. State of Florida ex rel. The Florida Bar*, U. S. .

We will demonstrate that the Court's action on May 13, 1963, in the instant case is "inconsistent with the assumptions upon which Congress has acted for over a [half] century." *Sperry* case, *supra*.

The first erroneous assumption which this Court was induced to make in both the instant case and the *Gilmore* case was that the 1942 amendments to Section 23(a) of the 1939 Code were a ratification of this Court's prior decisions in *DuPont*, *Higgins* and the other cases cited in the Court's opinion.

Nothing could be further from the historical fact.

The allowance of non-trade or non-business expense deductions inserted in the 1939 Code by Section 121 of the Revenue Act of 1942 was *retroactive back to March 1, 1913.*

Section 121(e) of the 1942 Revenue Act, which has not been cited by the Court (and perhaps overlooked), reads as follows:

> "(e) **Retroactive amendment to prior revenue acts.** For the purposes of the Revenue Act of 1938 *or any prior revenue Act*, the amendments made to the Internal Revenue Code by this section shall be effective as if they were a part of such revenue Act on the date of its enactment." [Emphasis ours.]

The Legislative History, only recently (and then only partly), has been made available to counsel for the Petitioners for very understandable reasons which will be stated.

Since Mr. Justice BLACK was, in 1934, sitting as one of the United States Senators from the State of Alabama, we can refer to his probable personal recollection of the Internal Revenue Bureau's campaign to disallow the expenses of United States Senators (paid beyond Congressional allotments) for Clerks' hire and telephone expenses. The Internal Revenue Bureau took the position that these were campaign expenses and not deductible under familiar doctrine. This was in the early months of 1934 when the Finance Committee was conducting hearings on what was to become the Revenue Act of 1934, the Bill then pending being H. R. 7835, 73rd Congress, 2d Session. The Hearings of March 6, 1934, before the Finance Committee have only recently been located and under circumstances remarkable enough to warrant their being brought to the attention of this Court.

The Hearings as originally reprinted were marked "Confidential." We will comment later on whether taxpayers generally and your Petitioners particularly should be denied the opportunity of presenting information on Legislative History which is readily available to the Respondent, the Internal Revenue Service, the Treasury Department and Justice Department.

When Mr. J. S. Seidman published his "Seidman's Legislative History of Federal Income Tax Law 1861-1938," he knew of these Hearings but was told that they were still classified as Confidential. When his book was reviewed by

Dean Erwin N. Griswold, 52 Harvard Law Review 718, Mr. Seidman was criticized for not including all relevant material.[5]

Upon this critical review coming to Mr. Seidman's attention, he wrote Dean Griswold and said that he refrained from publishing classified material lest he be criticized. Whereupon Dean Griswold wrote that, although these and other Congressional Hearings were classified, they had since been declassified.

Hence, when Mr. Seidman brought out his later work (Seidman's Legislative History of Federal Income and Excess Profits Tax Laws 1953-1939), he stated at page xv:

> "At the end of each Code section provision in this edition there is a reference table to the pages of related legislative history in the previous editions. Following this in some instances is a caption 'Additional Material.' This treats primarily with material that was classified by Congress as confidential when the previous editions were published but are now no longer restricted."

Mr. Seidman made avaible to one of your writers the Hearings of March 6, 1934, which will be quoted in part. However, when the same writer attempted to verify the "declassification" of these Hearings, he was told by the Legislative History Sections of both the Internal Revenue Service and Justice Department that "declassification" could not be verified; the applicable volume does not appear in the Library of Congress or at least is not readily locat-

[5] Dean Griswold said: "It should be pointed out, however, that the present volume is not complete. Not only does it omit entirely the material on estate, gift, and miscellaneous taxes, but there is much material bearing on the construction of the income tax sections to which it makes no reference. Thus, the important statement of Dr. Adams on the Revenue Act of 1921 does not appear here. No reference is made to the Gregg statement on the 1924 Act. *There are numerous other omissions*, enough so that it will apparently be impossible to rely on the present compilation as much more than a digest or partial index. The only place where the complete sources may now be found is in the compilations which have been made by Carlton Fox, Esq., of the Department of Justice. The final story on the legislative history of the Revenue Acts will not be told until Mr. Fox's compilations can be made more readily available." [Emphasis ours.]

able. The return of the inquiries was that the statement of Dr. Rosewell Magill was still classified "Confidential." In the light of this information, although we had read his remarks, we refrain from directly quoting him. However, there is no indication that the remarks of the Senators were classified and hence we will set forth, in the footnote, Senator Clark's comment[6] at page 30.

The amendment proposed was actually adopted by the Finance Committee but apparently was withdrawn on the renewed representation that it was unnecessary because the proposed amendment *was already the existing law and the established administrative practice.*

Being the administrative practice, Union Dues are obviously deductible as a business expense. The May 13th decision and the sentance from the opinion quoted at the outset indicates that there will be a new campaign to disallow the expenses of earning taxable income which everyone thought was put to rest by the 1942 amendment retroactive to March 1, 1913.

There is another facet of the early days of the pre-1942 campaign to disallow expenses of earning taxable income that should be called to this Court's attention. It first broke the surface on December 15, 1930, when the Board of Tax Appeals released the opinion in *Alice P. Bachofen von Echt,* 21 BTA 702. A bare majority of the Board held that attorneys' fees of preserving a life tenant's interest were not deductible. A stinging dissent was written by Member Sumner L. Trussell, concurred in by Members Lansdon, Phillips, Arundell, Van Fossan and Seawell, holding that the expenses should be deductible and if not deductible, the expenses were certainly capital expendi-

[6] "Senator Clark: Mr. Chairman, it seems to me that the point raised by Senator McAdoo might well be cleared up. Dr. Magill says that the Department has construed 'trade or business' to include 'professions' or 'vocations' or activity; but it seems to me the word 'profession' or 'vocation' ought to be inserted there. In other words, certainly there is no more reason why a lawyer, a doctor, or anybody else should have the right to make a deduction for the necessary expenses of carrying on their professions and vocations, than in the case of a man engaged as a plumber, or anything else."

tures[7] and not personal non-deductible non-capitalizable items. The taxpayer then applied for a rehearing and on November 9, 1932, the Board reversed itself and held the expenses deductible,[8]

III.

At this point it seems appropriate to make clear that Texas taxpayers represented by Texas attorneys (until the filing of this Petition) have been denied access to materials available in larger and older centers such as New York and Boston and the libraries therein. In part this can be traced to a heretofore unpublicized policy of classifying Hearings before the Congressional Committees on matters of everyday interest such as Internal Revenue campaigns. If it were wartime or the hearings involved the National Security, of course, it would be a different story.

Your Petitioners urge that The Solicitor General be directed to file a Response setting forth statutory or practical justification for this secrecy and setting forth the Legislative History on this subject as enthusiastically as it was produced in *Sperry* v. *The Florida Bar*, *supra*.

The Hearings before the Senate Finance Committee were attended by a large group of Treasury officials. The regular reporter took stenographic minutes. The minutes were transcribed at public expense. The Hearings were

---

[7] Now we have an explanation why the 1942 amendment to Section 23(a) was made retroactive: to prevent the Internal Revenue Bureau from being "whipsawed." The 1942 amendment made many expenses deductible which the Treasury Department had, successfully, ruled non-deductible. Taxpayers could, justifiably, claim that their cost basis should be increased although deductions were allowed. The retroactive provision of the 1942 amendment served to disallow addition to basis to those other taxpayers whose deductions were disallowed. A former member of this Court might have observed that "this is keeping the promise to the ear but breaking it to the hope."

[8] The reversal can only be found in 1 Prentice-Hall BTA Memo Decisions ¶ 32,254. This work was only published in 1945 when it became known that these important BTA Memorandum Decisions were not otherwise available to the Bar and the Courts. Hence it is understandable that the Second Circuit cited the published *von Echt* decision in its *Kales* case, 101 F2d 35, in 1939 since the unpublished reversal in 1932 was not called to its attention. This little facet of the Respondent's campaign to disallow the expenses of earning taxable income illustrates the very many erroneous assumptions which this Court was induced to make both in the instant case and in *Gilmore*, *supra*, and which now should be reconsidered and reviewed.

printed at public expense. This particular Hearing involves something very crucial to taxpayers generally. Except for the caveat "CONFIDENTIAL" on the cover, they are the ordinary pamphlet copies of Hearings that have been freely distributed since very early times. Mr. Seidman has asked us to emphasize that he has never been in Government Service in Treasury or Justice and he acquired his copy through a source not now identifiable but certainly not surreptitious. If the conversations took place and everyone was sworn to secrecy and no one talked, there would be no report to make.

Obviously this is a matter of great public interest for the protection of taxpayers from executive and administrative abuse. But for the fortunate finding of these minutes, this Court might be placed in a very untenable light before the Congressional Committees.

We submit that the Court should reject any notion that it will turn its back on this vital disclosure of administrative practice and the attempts at Congressional correction.

IV.

Next, we would point out that the Government's failure to refer to Section 48(d) of the 1939 Internal Revenue Code (and its 1954 re-enactment) is not new. It occurred in 1950 in the Sixth Circuit in a manner which should excite the interest of Mr. Justice STEWART if it has not previously been brought to his attention. In *Edwin R. Motch, Jr.*, 11 TC 777 the Tax Court had allowed the travelling expenses incurred by the taxpayer, an Army officer, in operating his Cadillac to advance his official duties. On appeal to the Sixth Circuit, the Commissioner talked about everything else but Section 48(d), painting with no broader brush than was used in *Gilmore* and in the instant case, and the Commissioner convinced Circuit Judges ALLEN, MARTIN and MCALLISTER that the Army officer's Cadillac expenses were not deductible (180 F2d 859).

The only trouble was: the brush was so broad it also disallowed the bus and subway carfares of Internal Revenue Agents.

The solution? Disregard the Sixth Circuit decision! This the Internal Revenue Service did in *IT-4012*, published in the Internal Revenue Bulletin of June 12, 1950, page 2, 1950-1 CB 33:

> "In view of the foregoing, the Bureau will not follow the decision in *Commissioner* v. *Edwin R. Motch, Jr., et ux., supra*, as a precedent insofar as it holds that traveling expenses in excess of per diem allowances, incurred by military and civilian officers and employees of the United States in the performance of their official duties, are not deductible under section 23(a)(1)(A) of the Internal Revenue Code."

While both the Internal Revenue Service and Justice Department frequently (and understandably) refuse to follow decisions *adverse* to their contentions, *Motch* is the only case that we know of where the Government has refused to follow an applicable Court decision *in its favor!*

Of course, this Court knows that Internal Revenue matters are an intensely practical subject and the true history must be learned at the taxpayer-Internal Revenue Agent level. An Internal Revenue Agent's explanation of why the Service refused to follow a decision in its favor reflects no credit on three very distinguished jurists.

V.

Now we can return to the crucial sentence of the decision in this case which bears repeating:

> "If full-time service to one corporation does not alone amount to a trade or business, which it does not, it is difficult to understand how the same service to many corporations would suffice."

Obviously this Court will give due deference to the positive command of what is now Section 7701(a)(26), quoted

in full, *supra*, page 4. In *IT-4012, supra*, the Internal Revenue Service, said:

> "In Senate Report No. 558, 73rd Cong., 2d Sess., page 29, (2 CB 1939-1, 586 at 608) submitted to accompany the Revenue Bill of 1934, the Commmittee on Finance stated that Section 48(d) was *declaratory of existing law.*" [Emphasis ours]

This could only be true if "existing law" was that *employment of any kind* was, in and of itself, the carrying on of *the employee's* trade or business and hence it was logical to make no distinction between private employment and public employment even to the point of high Public Office. We submit that the Court has unwittingly been placed in a dilemma which should be resolved by reargument and a revision of both the May 13, 1963, opinion and its direction for remand.

VI.

At the conclusion of Mr. Justice WHITE's opinion, the case is remanded to the Tax Court to take proof as to whether the taxpayers, having been held not to be engaged in business as to Mr. Whipple's employment, are engaged in business by virtue of ownership and operation of rental real property.

This invites the perpetuation of the insupportable premise that the owner of investments (or an employee rendering services) is not engaged in business while an investor in real estate, no matter how "passive," is still obviously "engaged in a trade or business."

The answer is not that simple. The best illustration is the Income Tax Treaty between the United Kingdom and the United States (60 Stat. 1377). Of course, it makes a great difference in the taxation of United States income to a United Kingdom resident whether that United Kingdom resident (an alien non-resident as to United States) is

"engaged in a trade or business." Article IX of the United Kingdom-United States Income Tax Treaty solves the dilemma most effectively. It gives the non-resident alien (United Kingdom resident) *the election* to say whether or not he is "engaged in business" in the United States. Thus in Article IX (1) of that Treaty, after holding that the mere ownership of real property is not engaging in a trade or business the subparagraph concludes:

> "Provided that any such resident may elect for any taxable year to be subject to United States tax as if such resident were engaged in trade or business in the United States."

VII.

While the Court specifically overrules the case of *Vincent C. Campbell*, 11 TC 510, (footnote 10) the Court obviously failed to recognize the important dislocation in the administrative level since the *Campbell* case was acquiesced by the Internal Revenue Service in 1949 (1949-1 CB 1).

The opinion of May 13th should be recalled. The case reconsidered in the light of Legislative History not previously available in Texas. Since much of the opinion in the instant case is grounded on what we have demonstrated as the uncertain footings of *United States v. Gilmore, supra*, we respectfully submit that the Court, *sua sponte*, should recall its mandate in No. 21 and restore that case for reargument along with the reargument of the instant case. *United States v. Ohio Power Co., 353 U. S. 98.*

Respectfully submitted,

A. C. Lesher, Jr.
Charles Dillingham
Ben H. Schleider, Jr.
John S. Brunson
Earl Q. Kullman

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

EARL Q. KULLMAN,
Counsel for Petitioners.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition have been duly served by mail upon The Solicitor General, counsel for Respondent.

EARL Q. KULLMAN,
Counsel for Petitioners.